Collins (1895) 46 Neb. 411; *Irrigation Co.* v. *Klein* (1901) 63 Kan. 484, in the majority of cases the result has been reached by following out the view of the mill cases that great public utility or benefit alone may constitute a public use. *Mining Co.* v. *Seawell* (1867) 11 Nev. 394; *Oury* v. *Goodwin* (1891) 3 Ariz. 255; *Byrnes* v. *Douglass* (1897) 83 Fed. 45. In taking this position the courts have refrained from laying down any definition of public use or any set test in respect of it. But their tendency, especially where the doctrine is invoked in favor of a single individual, *Ellinghouse* v. *Taylor* (1897) 19 Mont. 462, is to make public use equivalent to public advantage.

Eminent domain is a power inherent in government by virtue of its sovereignty, and intimately connected with political and economic necessity. *Kohl* v. *U. S.* (1875) 91 U. S. 367, 371. It has been described as "the right to appropriate private property to particular uses, for the purpose of promoting the general welfare." Lewis, Em. Dom., 2nd ed., 163. The Constitution of the United States provides that private property shall not be taken "for a public use without just compensation"; and similar expressions are to be found in the Constitutions of most States. By the established view these constitutional provisions are to be regarded not as mere expressions of the power of eminent domain, but as limitations upon it. *People* v. *Railroad Co.* (1899) 160 N. Y. 225, 237; *Brown* v. *Gerald* (Me. 1905) 61 Atl. 789. It would seem, therefore, that a holding that public use is co-extensive with public welfare is too broad. On the other hand, if it be conceded that the limitation should be interpreted with regard to the nature of the underlying power, the doctrine that there can be no public use without public participation or control is unnecessarily rigid. A middle ground is suggested by a recent case in the Supreme Court of the United States, which upholds the taking of land by an individual for private irrigation. *Clark* v. *Nash* (1905) 198 U. S. 361.

The court adopts the view, recognized in previous dicta, *Scudder* v. *Falls Co.* (1832) 1 N. J. Eq. 694, 728; *Falbrook Irr. Dist.* v. *Bradley* (1896) 164 U. S. 112, that the existence of a public use so largely depends upon the peculiar circumstances and conditions surrounding the locality in which the case arises, that no definite rule can be laid down in regard to it. The decision itself is inconsistent with the "public participation" test, and must, in the last analysis, rest on the principle that public advantage may constitute a public use. At the same time the court expressly repudiates the broad doctrine that "private property may be taken in all cases where the taking may promote the public interest." This repression of the tendency to nullify the doctrine of public use as a constitutional limitation properly defines the court's recognition of the need of flexibility on this branch of the law. The holding is important as it tends to reconcile much of the apparent inconsistency in the previous decisions. It has already been followed in connection with private mining development. *Baillie* v. *Larson* (1905) 138 Fed. 177.

ADMISSIBILITY OF DECEASED ACCOUNTANT'S ABSTRACT OF LOST ACCOUNT BOOKS.—As early as 1609 the custom of using account books as evidence was accorded legislative recognition by the restrictive

statute of James I (7 Jac. I, c. 12) and entries by a deceased clerk were established as an exception to the hearsay rule before the end of the century. Greenleaf on Evid. 16th ed., § 120 b. Meanwhile, the rule as to documentary originals, connected as it was with the necessity of profert in pleading, Thayer's Prel. Tr. p. 105, had been relaxed so as to permit the introduction of secondary evidence as to the contents of lost or destroyed documents. *Dr. Leyfield's Case* (1611) 10 Coke, 88, 92; *Read* v. *Brookman* (1789) 3 T. R. 151.

A recent New York case is an interesting example of the extent to which the courts have expanded these two exceptions. The plaintiff, an executor, was suing on a written instrument executed to his testator over twenty years prior to the action. One of the plaintiff's witnesses, a former bookkeeper of the defendant firm, testified in rebuttal of the inference of payment arising from the staleness of the claim, that when he left the defendant's employ the books showed that the alleged indebtedness remained uncanceled. The defendants then sought to prove that shortly after this date their creditors had retained an expert accountant to investigate their affairs, and that his report, carefully verified at the time by present witnesses, contained a full list of the firm's creditors, the name of plaintiff's testator not being included therein. The books themselves had been lost and the expert accountant was dead. The trial judge excluded this abstract, but the Appellate Division held this reversible error; that unusual liberality should be extended to all evidence bearing on the question of payment. *Rosenstock* v. *Dessar* (Nov. 1905) 34 N. Y. Law Journal, No. 46.

Although the books had been lost, still secondary evidence of their contents was admissible, since every reasonable effort had been made by the defendants to find them. *Minor* v. *Tillotson* (1833) 7 Peters 99. In establishing the competency of the books themselves the absence of the suppletory oath of the maker of the book entries could have been disregarded here, since that party, as plaintiff's witness, had already testified as to the existence of a specific item in the books,—thus clearly making the latter competent evidence in the defendant's behalf to dispute this fact. See Wigmore on Evid. § 2118, and cases cited.

To make this abstract competent even as secondary evidence and to employ it as a substitute for the lost books, its accuracy, as such, must first be established. The accountant was not in court to vouch for it, but on the same principle of necessity that governs the admission of entries of a deceased clerk, his death excused the absence of his testimonial verification. *Nichols* v. *Webb* (1823) 8 Wheat. 326, 334. Then too, considered as an entry in the course of business, the fact that this document was drawn up by a disinterested party in the course of professional employment is primarily a guarantee of its accuracy. Greenleaf on Evid., 16th ed. § 120 a. So an entry in his register by an attorney was held competent in *Leland* v. *Cameron* (1865) 31 N. Y. 115, 121, and an entry of baptism in the church record made by a priest, in *Kennedy* v. *Doyle* (1865) 10 Allen 161 and cases cited, each being dead at the time of the respective actions. Finally the testimony of witnesses who had compared the abstract with the books and found the former correct is highly important.

Clark v. *Bank* (1898) 32 App. Div. 316, 322; affirmed (1900) 164 N. Y. 498.

On principle it should not affect the result that this evidence was in form an abstract and not a copy. Abstracts of title, *Ward* v. *Garnons* (1810) 17 Ves. Jr. 134, and summaries of wills, *Sugden* v. *St. Leonards* (1876) L. R. 1 P. D. 154, 179, have been admitted. Wigmore on Evid. §§ 2105–2107. So also extracts from letters, *Walbridge* v. *Kilpatrick* (1876) 9 Hun 135; from lost or destroyed documents, *Sizer* v. *Burt* (1847) 4 Denio 426; and a solicitor's abstract from lost books of account. *Mayson* v. *Beazley* (1854) 27 Miss. 106. And see *Turner's Executors* v *Turner* (1903) 98 Md. 22. The opinion in the principal case takes the superficial position that this evidence is admissible because of the extreme age of the plaintiff's claim. While such circumstances may incline the court to unusual liberality, *Bean* v. *Tonnele* (1884) 94 N. Y. 381, 385, still it is submitted that, eliminating this factor, no other conclusion could have been logically reached.

INTERNATIONAL LAW AS PART OF THE LAW OF THE LAND.—The status of international law in municipal courts was lately recognized by the Court of King's Bench in the case of *West Rand C. G. M. Co.* v. *The King* [1905] 2 K. B. 391. The South African Republic had seized gold belonging to the plaintiff, for which by statute it should have made compensation. The plaintiff sought to recover from the British government on the theory that the latter succeeded to the rights and liabilities of the conquered republic. The court, per Lord ALVERSTONE, C. J., granting that international law was law, and that in a proper case its rules were enforceable in municipal courts on a parity with those of municipal law, held that the plaintiff's rights rested in the discretion of the political branch of the government, and were not cognizable in this instance by the court. It has long been recognized that many principles generally classed as part of international law are questions of political expediency and are cognizable in no municipal court. Such are questions of international boundaries, *Foster* v. *Neilson* (1829) 2 Pet. 253, 314, or rights of foreign warships, *Schooner Exchange* v. *M'Faddon* (1812) 7 Cr. 116. Whether such rules can be called law may be an open question. But with regard to the other branch of international law which is of a juridical nature, the question may now, in view of the principal case, be considered settled, despite the views of the analytic school of English jurisprudence. According to this school, international law is properly a branch, not of law, but of ethics, because, it is neither commanded, nor enforced, by an acknowledged superior. 1 Austin, Jurisprudence 3d ed., 187–9. The first objection seems to arise solely from the narrowness of Austin's definition of law, for it is submitted there is no essential difference between the originating causes of municipal and international law. The first is the sum of the customs obtaining between individuals, plus the statutes. Bryce, History and Jurisprudence, 683. The other is the sum of the customs obtaining between nations, plus declaratory treaties. *The Scotia* (1871) 14 Wall. 170. With regard to the second objection, it must be admitted that in